In the

# Supreme Court of the United States

OCTOBER TERM, 1971

**No. 71-366**

TIDEWATER OIL COMPANY,

*Petitioner,*

vs.

UNITED STATES OF AMERICA and
PHILLIPS PETROLEUM COMPANY,

*Respondents.*

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

| Date 1971 | FILINGS-PROCEEDINGS |
|---|---|
| July 1 | Rcvd June 30 orig and three copies of a petition for permission to appeal under 28 U.S.C. § 1292(b). To panel of July 6, 1971. C, H (7/12/71) |
| July 1 | Rcvd $25.00 docket fee—to Miss Murphy |
| July 9 | Received memorandum from Browning to send all material to panel of 7/12/71 C, H |
| July 12 | Recvd. orig & three of answer of the US to petition (C & H) |
| July 14 | Rcvd orig and three of reply memorandum of petitioner in support of petition for permission to appeal under 28 USC § 1292(b). To C, H. July 12, 1971. |
| Jul 28 | Filed order (C & H) denying pet for leave to appeal under § 1292 (b) |
| Sept. 21 | Issued certified copy of record to Clk Sc for certiorari. |
| Nov. 18 | Filed cert copy of SC order (11/9/71) denying pet for cert |
| **Date [1972]** | |
| March 27 | Filed certified copy of SC order (3/20/72) granting motion for leave to file petition for rehearing; further ordered that order of Nov. 9th, 1971, be vacated. (C & H) ht |
| 27 | Filed certified copy of SC order (3/20) granting petition for writ of certiorari (C & H) ht |

## *Appendix 2*

*United States Court of Appeals*
*For the Ninth Circuit*

Filed Jul 28 1971

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| TIDEWATER OIL COMPANY,<br>*Defendant and Petitioner,*<br>vs.<br>UNITED STATES OF AMERICA<br>*Plaintiff and Respondent.*<br>and<br>PHILLIPS PETROLEUM COMPANY,<br>*Defendant and Respondents.* | Misc. 5791 |

Before: CHAMBERS and HAMLEY, Circuit Judges

The petition for leave to appeal under § 1292(b) is denied. *United States v. Ford Machinery Corporation*, 9 Cir., 321 F.2d 534.

## *Appendix 3*

***In the***
***United States Court of Appeals***
***For the Ninth Circuit***

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**Misc. No. 5791**

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TIDEWATER OIL COMPANY,

*Defendant-Petitioner,*

vs.

UNITED STATES OF AMERICA,

*Plaintiff-Respondent,*

and

PHILLIPS PETROLEUM COMPANY,

*Defendant-Respondent.*

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PETITION FOR PERMISSION TO APPEAL
UNDER 28 U.S.C. § 1292(b)

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Pursuant to 28 U.S.C. § 1292(b)[1] Tidewater Oil Company (hereafter "Tidewater") petitions the Court for permission to

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All emphasis in quotations has been added unless otherwise noted.

1. Section 1292(b):

"When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Provided, however,* That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order."

appeal from an order entered June 24, 1971 in the United States District Court for the Central District of California in the case of *United States of America v. Phillips Petroleum Company and Tidewater Oil Company*, Civil No. 66-1154-WJF, denying Tidewater's motion to dismiss the case as against it (Appendix A).[2]

The question involved is so important and the answer to it so determinative of the future course of the case that, in denying the motion, the District Court on its own initiative stated that it would certify the matter for an interlocutory appeal and would defer trial of the case until the question was authoritatively decided (App. F).

The District Court's formal order certified under 28 U.S.C. § 1292(b) that its decision "involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from that order may materially advance the ultimate termination of this litigation" (App. A).

## I.

## STATEMENT OF THE FACTS

March 29, 1966, Tidewater entered into a contract with Phillips Petroleum Company (hereafter called Phillips) to sell to Phillips for $325,000,000 the manufacturing, marketing and transportation assets of Tidewater's Western Marketing and Manufacturing division, but not its production properties, the transaction to be consummated on June 30, 1966. At the request of the Antitrust Division of the United States Department of

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2. The following appendices are attached to this petition:
   A: Order denying motion to dismiss;
   B: The complaint;
   C: Findings of Fact and Conclusion of Law in re Motion for Preliminary Injunction and Order;
   D: Tidewater's notice of motion to dismiss;
   E: Affidavit of R. D. Copley, Jr.;
   F: Excerpts from the transcript on the hearing of the motion to dismiss.

Justice on June 28, 1966, Tidewater and Phillips voluntarily postponed the consummation to July 14, 1966 at 10 A.M. E.D.T.[3] The Division did not reach a decision to oppose the transaction until July 13, 1966, the day before the scheduled closing. On that day it filed a complaint in the court below against Phillips and Tidewater, assailing the proposed acquisition by Phillips as violative of Section 7 of the Clayton Act (App. B).[4]

Section 7 (15 U.S.C. § 18) provides:

> No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

The relevant portion of Section 7 is that which refers to acquisition of assets, as no stock or share capital passed in either direction.

Concurrently with filing the complaint, plaintiff applied to the District Court for a temporary restraining order against the consummation of the transaction pending hearing on a motion for preliminary injunction. What then occurred is related in the findings (App. C) thus:

> "6. After filing its complaint herein on July 13, 1966, plaintiff, in the afternoon of that day, applied to the Honorable Charles H. Carr, District Judge, for a temporary restraining order to restrain the consummation of the transaction. Judge Carr, without ordering any restraint upon defendants, directed the plaintiff to apply to the District Judge to whom the suit had been regularly assigned upon

3. 7 A.M., P.D.T.

4. The foregoing facts appear in findings 1 to 5 of findings below, App. C.

its filing, and plaintiff did so on July 14, 1966.[5] Although the application did not come on for hearing before this Court until after the hour scheduled for closing of the transaction on that day, defendants, *in deference to the Court,* delayed the closing of the transaction pending the Court's judicial determination. In the afternoon of July 14, 1966, this Court denied the requested restraining order, *thus permitting the transaction to be closed.* * * Thereafter on July 14, 1966, Tidewater and Phillips closed and consummated the transaction provided for by the agreement of March 29, 1966. Tidewater thereby sold and transferred title and delivered possession to Phillips of all the properties and assets which it had agreed and bound itself to do by said Letter Agreement, and, in so doing, acted pursuant to the obligation of the Letter Agreement."

Judge Whelan concurrently set down plaintiff's motion for preliminary injunction for hearing. After full hearing on August 4 and 5, 1966, receipt of extensive evidence, and full briefing, the District Court denied a preliminary injunction with a reported opinion (*United States v. Phillips Petroleum Co. and Tidewater Oil Co.,* 1966 Trade Cas. ¶ 71,872) and upon a full set of findings (App. C), from which we have quoted.

Later, September 30, 1967, Tidewater merged into Getty Oil Company (App. E). Tidewater thus exists for the purpose of this case alone.[6] Any relief which could lawfully be issued against

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5. The case had been assigned to the Honorable Francis C. Whelan, District Judge, but Judge Whelan was attending the Judicial Conference of the Ninth Circuit at Newport Beach, California, and the application came on before Judge Carr.

6. F.R. Civ. P. Rule 25(c) provides that in case of any transfer of interest by a party, the action may be continued against the party unless the court on motion directs the transferee to be substituted or joined. According to *DeVilliers v. Atlas Corp.,* 360 F.2d 292 (10 Cir. 1966), a corporate merger is a transfer of interest within the meaning of Rule 25 (c). Both Tidewater and Getty were Delaware corporations, and Del. Corp. Code § 261 provides that in an action against a corporation thereafter merged into another, the surviving corporation may be substituted or the action proceed against the original party.

Tidewater—and the gist of our contention is that none can be—would thus be visited upon Getty Oil Company. After the denial of the temporary injunction the case has proceeded as one to compel divestiture by Phillips of the acquired assets. Settlement discussions took place between plaintiff and Phillips, from which Tidewater was excluded, and Tidewater (Getty) has been wholly inactive except to respond to plaintiff's request for production of documents.

In April, 1971, plaintiff informed the District Court that it had completed its discovery and was ready to go to trial. Thereupon Tidewater filed notice of its motion to dismiss (App. D)

> "on the ground that Section 7 of the Clayton Act is directed only against the acquiring corporation and not against the seller, that the sale of assets by defendant Tidewater Oil Company to Phillips Petroleum Company has long ago been consummated, that no relief is obtainable against Tidewater Oil Company, and that its presence in the suit is no longer necessary or appropriate."

This motion the District Court denied, and from the order of denial Tidewater seeks leave to appeal. In denying the motion the Court said (App. F):

> "THE COURT: I am going to deny the motion, Mr. Lasky. I feel that there is sufficient authority in the law and sufficient power in the court to keep Tidewater as a defendant, a party defendant.
>
> However, I do recognize that the course of the trial will depend upon the correctness of my ruling.
>
> And therefore I will issue an order making my ruling appealable.
>
> * * *
>
> *Because if you are in that is one type of a lawsuit and if you are out that is another kind of lawsuit.*"

## II.

## STATEMENT OF THE QUESTION

1. On the merits the question is this:

Does Section 7 of the Clayton Act address itself at all to the seller of assets or does it not impose all its prohibitions on the buyer alone? Consequently, after a sale of assets has been consummated, can any relief be granted against the seller? Is it not improper to retain the seller in the case and subject it to the burden and expense of trial?

This case involves no question under Section 1 of the Sherman Act.[7] Nor is it a case where the consideration received by the seller includes shares of the buyer whereby the seller would also be an acquirer.

2. There is a jurisdictional question which we present in Part IV below.

## III.

## THE REQUISITES FOR AN INTERLOCUTORY APPEAL ARE PRESENT

We submit that the requisites for an interlocutory appeal under 28 U.S.C. § 1292(b) are present.

A. Substantial Ground for Difference of Opinion

The element of "substantial ground for difference of opinion" is more than present; we submit that the decision below lacks any basis at all.

By its plain language, Section 7 is aimed only at the buyer:

> "[N]o corporation . . . shall acquire the whole or any part of the assets of another corporation . . ."

In *Dailey v. Quality School Plan, Inc.*, 380 F.2d 484, 488 (1967), the Fifth Circuit said:

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7. The complaint invokes only Section 7 of the Clayton Act (App. B). Therefore Section 1 of the Sherman Act is not relevant. *Times-Picayune v. United States*, 345 U.S. 594, 609, 610.

"Cowles contends that the complaint should be dismissed as to it insofar as the cause of action against it rests on § 7 of the Clayton Act. The argument is that § 7 is directed against the acquiring corporation only and not against the seller. This position is well taken. § 7 by its terms proscribes only the acquiring corporation. There seems to be no decision to this effect but the language of the statute is clear. We thus affirm the dismissal as to Cowles on the § 7 charge."

In *McGuire v. Columbia Broadcasting System, Inc.*, 399 F.2d 902, 906 (1968), this Court approved that statement in the *Dailey* case as obvious, in an analogous situation.

"A similar interpretation of Section 7 of the Clayton Act (15 U.S.C. § 18) was made in Dailey v. Quality School Plan, Inc., 380 F.2d 484, (5th Cir. 1967) where the Court held that Section 7 forbidding certain acquisitions applied only to an acquiring corporation and not to the corporation being acquired."

The Federal Trade Commission reached exactly the same conclusion, *In Re Dean Foods,* Trade Reg. Rep., 1965-1967 Transfer Binder, ¶ 17,765 (1966), where it said (p. 23,116):

"We agree with the hearing examiner and with Bowman [the selling corporation] that Bowman was not a proper party to the Section 7 charge and that the complaint should be dismissed as to Bowman with respect to this charge.

* * *

"It is clear under the language of this section that the Clayton Act prohibition was directed solely against the acquiring companies and did not encompass the activities of the acquired company."[8]

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8. The textwriters are in accord: Handler, Annual Review of Antitrust Developments, 15 Record of the Association of the Bar of the City of New York, 362 at 387 (in 1960):

"The statute is clear on its face. And for once nobody disputes its clarity. No one has suggested that a seller can run afoul of Section 7. Nor is there anything in the legislative reports indicating a purpose to reach sellers."

This is not a case where parties hurry to conclude a transaction before the matter can be subjected to judicial scrutiny. Here Tidewater first postponed the closing date at the request of the Department of Justice and then further refrained from consummating the sale, despite the fact that it was under no restraint, until the Court had brought to bear its judicial faculties and had held that nothing stood in the way. Therefore cases like *Jones v. Securities Exchange Commission,* 298 U.S. 1, 17, 18 (1936) are inapplicable.

Nor does this case involve any question about the propriety of joining a prospective seller as a defendant in a suit instituted to enjoin the sale *before* it is consummated and keeping it a defendant *so long as consummation does not occur.* At *that stage,* not joining the seller as a party could be erroneous as denying to the seller a right to be heard on a matter affecting its interests, since an injunction against the buyer's consummating the purchase would deprive the seller of his rights under the contract. In that situation, the seller would be entitled to demand to be heard (F.R.Civ.P.Rule 19(a)(2)). But, once the court has denied an interlocutory injunction and the sale is consummated, the seller no longer has any interest to be preserved, and no claim for relief exists against it.

For some years the Antitrust Division has toyed with a contention that relief can be granted against the seller. But no court has ever sustained that contention. In *United States v. Reed Roller Bit Co.,* 274 F.Supp. 573 (W.D. Okla. 1967), the Antitrust Division contended that the court could order rescission and compel the seller to buy back the property, but the District Court expressly declined to answer that contention for it found nothing in the facts that would warrant a rescission even if it had the power to do so.

Were the contention that a rescission could be ordered upheld, there would be a mad paradox. The buyer, whose conduct alone is proscribed by law, would run no risks; the seller whose

conduct is not proscribed by law, would be saddled with them. That is to say, if an acquisition were upheld, the buyer would benefit from his bargain; if it were held illegal, he would be restored to his position prior to the purchase, while the seller would have to take back the property. Phillips would be delighted (App. F., p. 32.)

[Part of pp. 9 and 10 deleted]

## IV.

## THE JURISDICTION OF THIS COURT

Because the United States is the plaintiff and this is an antitrust suit, a jurisdictional question is present.

The Expediting Act of 1903 (15 U.S.C. § 29) provides:

> "In every civil action brought in any district court of the United States under any of said [Antitrust] Acts, wherein the United States is complainant, *an appeal from the final judgment* of the district court will lie only to the Supreme Court."

Thus the Supreme Court has exclusive jurisdiction of appeals from *final* orders in antitrust suits by the government. No interlocutory appeal can be taken to the Supreme Court because the sole provisions of the Judicial Code for appeals from interlocutory orders relate to the Courts of Appeals. 28 U.S.C. § 1292.

The question posed by these facts is whether antitrust suits by the government are so different from other litigation that no interlocutory appeal under 28 U.S.C § 1292(b) lies to any court. If such an appeal does not lie to a Court of Appeals, it does not lie at all.

[Remainder of p. 11 and pp. 12 to 17 deleted]

## CONCLUSION

Our petition poses *two* important questions in antitrust law. Each is so important as to justify careful judicial consideration. For the foregoing reasons, we respectfully submit that this Court should grant leave to Tidewater under 28 U.S.C. § 1292(b) to appeal the ruling of the District Court denying Tidewater's motion to dismiss.

Dated: June 30, 1971.

MOSES LASKY
BROBECK, PHLEGER & HARRISON
R. D. COPLEY, JR.
C. LANSING HAYS, JR.
HECHT, HADFIELD, HAYS, LANDSMAN & HEAD

*Attorneys for Defendant-Petitioner Tidewater Oil Company and Getty Oil Company*

## *Appendix A*

[To Petition for Permission to Appeal]

[Names and Addresses of Attorneys Omitted]

*United States District Court*
*Central District of California*
Civil No. 66-1154-WJF
Filed: Jun 24, 1971

UNITED STATES OF AMERICA,
*Plaintiff,*

vs.

PHILLIPS PETROLEUM COMPANY
and TIDEWATER OIL COMPANY,
*Defendants.*

### ORDER AND CERTIFICATION FOR INTERLOCUTORY APPEAL UNDER SECTION 1292(b) OF TITLE 28 OF THE UNITED STATES CODE

The motion of defendant Tidewater Oil Company ("Tidewater") for dismissal upon the ground that Section 7 of the Clayton Act is directed only against the acquiring corporation and not against the seller, that the sale of assets by defendant Tidewater to defendant Phillips Petroleum Company ("Phillips") has long ago been consummated, that no relief is obtainable against Tidewater, and that its presence in the suit is no longer necessary or appropriate, having duly come on for hearing on June 14, 1971; the Court having heretofore denied plaintiff's application for a temporary restraining order, thus permitting Tidewater's sale of assets to Phillips to be consummated, as found by the Court (Findings 5 and 6 entered November 7, 1966) upon denial of plaintiff's motion for a preliminary injunction,

IT IS HEREBY ORDERED, ADJUDGED and DECREED:

1. The motion of Tidewater for dismissal is denied.

2. The Court finds that its order denying defendant Tidewater's motion to dismiss involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from that order may materially advance the ultimate termination of this litigation. This Court, therefore, certifies its order denying defendant's motion to dismiss for interlocutory appeal under Section 1292(b) of Title 28 of the United States Code.

Dated: June 24, 1971.

WARREN J. FERGUSON
*United States District Judge*

[Approvals by counsel deleted]

## *Appendix B*

[To Petition for Permission to Appeal]

Harry W. Cladouhos
Department of Justice, Antitrust Division
1546 U.S. Post Office and Court House
Los Angeles, California 90012
688-2500

*United States District Court*
*for the Southern District of California*
*Central Division*
Civil No. 66-1154-FW
Filed: July 13, 1966

United States of America,
*Plaintiff,*

v.

Phillips Petroleum Company
and Tidewater Oil Company,
*Defendants.*

### COMPLAINT

The United States of America, by its attorneys, acting under the direction of the Attorney General of the United States, brings this civil action to obtain equitable relief against the above-named defendants, and complains and alleges as follows:

### I.

### JURISDICTION AND VENUE

1. This complaint is filed and these proceedings are instituted under Section 15 of the Act of Congress of October 15, 1914, c.

323, 38 Stat. 736, as amended, 15 U.S.C. § 25, entitled "An act to supplement existing laws against unlawful restraints and monopolies and for other purposes," commonly known as the Clayton Act, in order to prevent and restrain continuing violation by the defendants, as hereinafter alleged, of Section 7 of the Clayton Act.

2. Tidewater Oil Company maintains its principal offices and transacts business within the Southern District of California.

## II.

## DEFENDANTS

3. Phillips Petroleum Company, hereafter referred to as "Phillips", is made a defendant herein. Said defendant is a corporation organized and existing under the laws of the State of Delaware, and has its principal offices at Bartlesville, Oklahoma.

4. Tidewater Oil Company, hereafter referred to as "Tidewater", is made a defendant herein. Said defendant is a corporation organized and existing under the laws of the State of Delaware, and has its principal offices at 4201 Wilshire Boulevard, Los Angeles, California.

## III.

## DEFINITIONS

5. (a) As used herein, the term "five western states" means the states of California, Oregon, Washington, Nevada and Arizona.

(b) Each reference hereinafter to Phillips or to Tidewater includes the subsidiaries thereof.

## IV.

## NATURE OF TRADE AND COMMERCE

6. Phillips and Tidewater are each integrated oil companies, being engaged in the acquisition of oil and gas lands; the production of crude oil, natural gas and natural gas liquids; the manu-

facture of refined petroleum products; and the transportation and marketing of crude oil and the products derived therefrom.

7. The nineteen largest integrated oil companies in the United States, commonly referred to as the major oil companies, including Phillips and Tidewater, directly or indirectly, produce over half the crude oil produced in the United States; own over 82% of the refining capacity and account for over 87% of the refinery runs in the United States; either own or control the major part of the interstate pipeline facilities for the transportation of crude oil and refined petroleum products in the United States; and market approximately 68% of the gasoline sales in the United States.

8. Seven major oil companies, including Tidewater, produce approximately 60% of the crude oil produced in the five western states; own over 84% of the refining capacity and account for about 87% of the refinery runs therein; and market approximately 78% of the motor gasoline sales therein.

9. Seven major oil companies, including Tidewater, produce over 61% of the crude oil produced in California; own over 83% of the refining capacity and account for approximately 85% of the refinery runs therein; and market approximately 80% of the motor gasoline sales therein.

10. California is the most attractive, largest and fastest growing market in the country with respect to motor gasoline sales. For many years California has consistently led all other states with respect to motor vehicle registrations and consumption of motor gasoline. In 1965, California led all states in motor vehicle registrations with about 9.9 million, or 11% of total registrations in the United States and about 4 million more than New York, the second leading state. In 1965, motor gasoline consumption in California was 170.9 million barrels, or about 10% of total consumption in the country and about 62.6 million barrels more than that of New York, the second leading state.

11. As of December 31, 1965, Phillips had total assets of over $2 billion, ranking 8th in total assets among domestic oil

companies. In 1965, it had gross revenues of approximately $1.4 billion and net profits of over $127 million, ranking 10th and 8th, respectively, among domestic oil companies.

12. As of December 31, 1964, Phillips had net owned proved domestic reserves of crude oil and condensate estimated at 427,034,880 barrels or approximately 1.4% of such domestic reserves. In 1965, Phillips' domestic crude oil, condensate and natural gas liquids production was 241,700 barrels daily, or 2.7% of such domestic production, ranking 8th among domestic producers. Phillips produces crude oil in most of the producing states of the United States, including Alaska and California. It owns and operates six domestic refineries having a total operating capacity of 289,000 barrels per day, or 2.9% of such total domestic capacity, ranking 11th among domestic refiners. In 1965, Phillips' crude refinery runs amounted to 249,000 barrels per day, or 2.8% of such total domestic runs, ranking 12th among domestic refiners. In 1965, Phillips sold almost 4.0% of the total tax-paid motor gasoline sales in the United States. Phillips currently markets its own brand name refined petroleum products, including motor gasoline, through more than 19,000 service stations.

13. From a small area overlapping parts of Kansas and Oklahoma, Phillips has, since 1927, expanded its marketing of refined petroleum products, including motor gasoline, into all states of the United States, except Alaska, California and Hawaii, ranking, in 1965, among the top ten companies with respect to motor gasoline sales in thirty such states. This expansion was particularly accelerated following World War II. Since then, Phillips has entered at least 27 states, including those four of the five western states in which it currently markets. Phillips has the capability of substantially increasing its motor gasoline sales in the five western states and could reasonably be expected to do so absent the acquisition referred to in paragraph 22 of this complaint. Phillips also has the capability of entering the

California market on a substantial scale with respect to motor gasoline sales and, absent said acquisition, would be a reasonably probable entrant. Phillips is one of the few substantial potential entrants into the highly concentrated California market.

14. Tidewater is one of the leading integrated companies in the petroleum industry. Getty Oil Company, through stock ownership, has the power to control the operations and policies of Tidewater, Skelly Oil Company, Mission Corporation, and Mission Development Company. Getty Oil Company is a nonintegrated producer of crude oil and natural gas in the United States and several foreign countries. Skelly Oil Company is an integrated petroleum company whose operations are carried on principally in the mid-continent area of the United States and in Canada. Mission Corporation and Mission Development Company are primarily holding companies. The combination of the Getty interests would rank 13th among the domestic petroleum companies in total assets.

15. As of December 31, 1965, Tidewater had total assets of almost one billion dollars, ranking 15th among domestic major oil companies. In 1965, it had gross revenues of $834 million and net profits of approximately $56 million, ranking 15th and 16th, respectively, among domestic oil companies.

16. As of December 31, 1964, Tidewater had net owned proved domestic reserves of crude oil and condensate estimated at 652,847,000 barrels, or 2.1% of such total domestic reserves. In 1965, Tidewater's domestic crude oil, condensate and natural gas liquids production was 149,000 barrels daily, or 1.7% of such total domestic production, ranking 14th among domestic producers. Tidewater is the third largest producer of crude oil in California and in the five western states. It also has substantial crude oil production in the states of Texas and Louisiana. Tidewater's operating refining capacity amounts to 260,000 barrels per day, or 2.6% of such total domestic capacity, ranking 12th among domestic refiners. In 1965, its crude refinery runs were

192,778 barrels daily, or 2.1% of such total domestic runs, ranking 15th among domestic refiners. In 1965, Tidewater sold approximately 2.1% of the total tax-paid motor gasoline sales in the United States. Tidewater markets its brand name refined petroleum products, including motor gasoline, in nineteen states and the District of Columbia, primarily on the east and west coasts.

17. In 1965, Tidewater and Phillips sold approximately 706 million and 59 million gallons of motor gasoline in the five western states having a retail value of approximately $41 million and $12 million, respectively.

18. In 1965, Tidewater's and Phillips' shares of motor gasoline sales in the five western states were 7.1% and .6% respectively. Their respective shares of motor gasoline sales in each of said states were: California—6.8% and 0%; Oregon—5.4% and .6%; Washington—4.3% and 2.3%; Arizona—.7% and 2.8%; and Nevada—5.8% and 4.6%.

19. Tidewater has for many years sold substantial quantities of unbranded motor gasoline to independent rebranders or marketers for resale under their private brand names. These independent rebranders or marketers generally sell motor gasoline to the consumer at one cent or two cents a gallon below the prevailing price of brand name motor gasoline sold by the major oil companies. In 1965, Tidewater's sales of motor gasoline to such rebranders or marketers in the five western states and in California amounted to approximately 157 million gallons and 140 million gallons, having a resale value of approximately $31 million and $29 million, respectively. Tidewater's sales of motor gasoline to such rebranders or marketers in the five western states and in California accounted for approximately 13% and 18%, respectively, of the total motor gasoline sales by such rebranders or marketers in the five western states and in California.

20. The number of independent refiners in the California market has declined from 27 in 1947 to only seven in 1965. The

percent of total operating refining capacity in that market owned by said refiners declined from 16.2% to 5.5% during the same period. Independent refiners constitute a substantial source of motor gasoline supplies for independent rebranders or marketers in said market.

21. Substantial quantities of refined petroleum products, including motor gasoline, are manufactured by Phillips and Tidewater and are distributed and sold in interstate commerce by each such company in states other than those in which said products were manufactured.

## V.

## OFFENSE CHARGED

22. On March 29, 1966, Phillips and Tidewater entered into a Letter Agreement providing for the sale by Tidewater to Phillips of substantially all the manufacturing, marketing and transportation assets and operations of Tidewater's Western Marketing and Manufacturing Division located in the states of Arizona, California, Hawaii, Idaho, Nevada, Oregon and Washington for a consideration of approximately $325 million. The agreement further provides that Phillips will pay Tidewater an amount equal to the value of Tidewater's inventory of crude, products, material and supplies on hand at the transfer date, the estimated value of which is approximately $60 million.

23. The Tidewater assets to be acquired by Phillips include among others: a 135,000 barrel-per-day refinery at Avon, California, which manufactures a complete line of refined petroleum products; 13 product terminals; 219 bulk plants; 3,654 retail outlets; Seaside Oil Company, Tidewater's wholly owned marketing outlet for off-brand product sales; all transportation facilities relating to Tidewater's western division marketing and manufacturing operations, such as pipelines and five tankers; and Tidewater's office building in Los Angeles, California.

24. The acquisition of Tidewater's Western Marketing and Manufacturing Division assets and operations pursuant to the agreement described in paragraph 22 may substantially lessen competition or tend to create a monopoly in violation of Section 7 of the Clayton Act, as amended, in the following manner:

(a) Actual and potential competition between Phillips and Tidewater in the sale of motor gasoline in the five western states and in California will be eliminated;

(b) Competition generally in the sale of motor gasoline in the five western states and in California may be substantially lessened; and,

(c) A substantial source of motor gasoline for independent rebranders or marketers in the five western states and in California may be eliminated.

## VII.

## PRAYER

WHEREFORE the plaintiff prays:

(1) That a preliminary injunction be issued against Phillips and Tidewater preventing and restraining them from taking any action in furtherance of the agreement described in paragraph 22, or any similar agreement, pending final adjudication on the merits of this complaint;

(2) That pursuant to Section 15 of the Clayton Act, the Court order summons to be issued to the Phillips Petroleum Company commanding it to appear and answer the allegations contained in this complaint, and to abide by and perform such orders and decrees as this Court may make in the premises;

(3) That the proposed acquisition of Tidewater's Western Marketing and Manufacturing Division assets and operations be adjudged and decreed to be unlawful and in violation of Section 7 of the Clayton Act;

(4) That Phillips and Tidewater and all persons acting on their behalf be perpetually enjoined from carrying out the agreement described in paragraph 22, or any similar agreement;

(5) That Tidewater be enjoined from selling or otherwise disposing of its Western Marketing and Manufacturing Division assets and operations, or any part thereof, to any major oil company engaged in the marketing of motor gasoline in the five western states, or any part thereof, without the consent of plaintiff or a showing to the court that said sale or other disposition will not substantially lessen competition;

(6) That plaintiff have such other, further, general, and different relief as the nature of the case may require and the Court may deem proper in the premises; and,

(7) That the plaintiff recover its taxable costs.

[Signatures of Counsel for Plaintiff and Verfication Omitted]

Appendix C to the Petition for Permission to Appeal consists of the "Findings of Fact and Conclusions of Law in re Motion for Preliminary Injunction and Order" in the District Court. A copy is printed as Appendix C to the Petition for a Writ of Certiorari in this cause and is incorporated herein by reference.

Appendix D to the Petition for Permission to Appeal consists of the Notice of Motion by Tidewater Oil Company for Dismissal in the District Court. A copy is printed as Appendix D to the Petition for a Writ of Certiorari in this cause and is incorporated herein by reference.

Appendix F to the Petition for Permission to Appeal consists of excerpts from the Reporter's Transcript of Proceedings in the District Court on June 14, 1971. Portions are printed in Appendix E to the Petition for a Writ of Certiorari in this cause and are incorporated herein by reference.

# Supreme Court of the United States

*No.* 71-366

Tidewater Oil Company,

Petitioner,

v.

United States and Phillips Petroleum Company

ON CONSIDERATION of the motion for leave to file a petition for a rehearing,

IT IS ORDERED by this Court that the said motion be, and the same is hereby, granted.

IT IS FURTHER ORDERED that the order denying petition for a writ of certiorari on November 9, 1971, be, and the same is hereby, vacated.

# Supreme Court of the United States

*No.* 71-366 *, October Term, 19*

Tidewater Oil Company,

Petitioner,

v.

United States and Phillips Petroleum Company

ORDER ALLOWING CERTIORARI. Filed March 20 ---------- , 19 72.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth ----------. Circuit is granted.